UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

LANCASTER LEASING PARTNERSHIP LP d/b/a AUDUBON VILLA[1] Employer and PATRICIA YALE, an Individual Petitioner and SEIU HEALTHCARE PA Union Involved	Case 4–RD–2184

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer operates a nursing home in Lititz, Pennsylvania called Audubon Villa where the Union Involved,[2] SEIU Healthcare PA, represents a bargaining unit of nonprofessional employees. The Petitioner, Patricia Yale, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the representative of the unit. The Employer and the Union contend that the petition should be dismissed because the parties had entered into a contract before the petition was filed.

A Hearing Officer of the Board held a hearing, and the Union filed a brief. I have considered the evidence and the arguments presented by the parties, and, as discussed below, I have concluded that there is a contract bar which precludes the processing of the petition. Accordingly, I shall dismiss the petition.

To provide a context for my discussion, I will first present background information. Then, I will review the factors that must be evaluated in determining whether a contract bar exists. Finally, I will present in detail the facts and reasoning that support my conclusion.

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[1] The Employer's name appears as amended at the hearing.

[2] For convenience, this Decision will refer to the Union Involved as "the Union."

I. BACKGROUND

Audubon Villa is operated by a partnership whose general partner is the president of PennMed consultants, a separate entity which manages the facility.[3] PennMed also manages several other nursing facilities owned by different partnerships within the same geographic area, and the Union represents units of employees at some of these facilities. Each facility has a separate collective-bargaining agreement. Audubon Villa has 54 resident beds and 37 bargaining unit employees.

The Union[4] was certified to represent the Audubon Villa bargaining unit in 1992, and the parties have entered into several successive contracts in the intervening years. The most recently expired contract had a term of July 1, 2007 to March 31, 2010. The Union and PennMed recently conducted negotiations for a new contract for bargaining units at six nursing facilities, including Audubon Villa.

II. FACTORS RELEVANT TO DETERMINING WHETHER THERE IS A CONTRACT BAR

The purpose of the Board's contract bar doctrine is to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958); see also *Deluxe Metal Furniture Co.*, 121 NLRB 995, 997 (1958). Pursuant to this policy, a contract for a reasonable term not in excess of three years will bar the processing of a representation petition for the term of the contract, except that a petition filed during the "window period," more than 60 but less than 90 days before the termination date of the contract, will be processed. *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958, 959–960 (1982); *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). In the health care industry, such petitions must be filed between 90 and 120 days before expiration of the contract. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

To constitute a bar, a contract must be in writing, must be signed by all parties prior to the filing of a petition, and must contain substantial terms and conditions of employment to which the parties can look for guidance in resolving day-to-day problems. *Waste Management of Maryland,* 338 NLRB 1002 (2003); *Cooper Tank and Welding Corp.*, 328 NLRB 759 (1999); *Appalachian Shale Products*, above at 1162-1163. Among other things, the contract must have a readily discernible effective date and expiration date. *Coca-Cola Enterprises, Inc.*, 352 NLRB 1044, 1045 (2008), citing *South Mountain Healthcare and Rehabilitation Center*, 344 NLRB 375 (2005). The party asserting that a contract operates as a bar bears the burden of proving that it was signed by both parties before a petition was filed. See *Coca-Cola Enterprises,* above; *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970).

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[3] In 2000, the Employer became the successor to a company that previously operated Audubon Villa.

[4] The Union has since changed its name.

For bar purposes, a contract need not take the form of a single, self-contained document. *St. Mary's Hospital and Medical Center*, 317 NLRB 89, 90 (1995). The agreement may consist of multiple documents, provided that they are signed and clearly manifest the parties' intent, and the documents taken together must "clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and acceptance of those terms through the parties' affixing of their signatures." *Pontiac Ceiling & Partition Company, LLC*, 337 NLRB 120, 123 (2001), citing *Seton Medical Center*, 317 NLRB 87 (1995). Minor deviations as to the parties' versions of the agreement are not sufficient to remove a contract bar, where the agreement contains substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. Ibid.

The Board has held that an agreement may serve as a bar even where it does not delineate all provisions of the new agreement. *Jackson Terrace Associates*, 346 NLRB 180, 181 fn. 3, (2005), citing *Stur-Dee Health Products*, 248 NLRB 1100, 1101 (1980); *Farrel Rochester Division of USM Corporation*, 256 NLRB 996, 999 fn. 3 (1981). The parties may confine their negotiations to those parts of the expiring agreement that they wish to revise, leaving the remaining provisions in place. *Jackson Terrace Associates*, above. The absence of material matters left open for further negotiation together with the implementation of the agreement upon ratification are also factors supporting the finding of a contract bar. *Television Station WVTV,* 250 NLRB 198, 199 (1980); see also *Farrel Rochester Division of USM Corporation*, above.

III. FACTS

Chronology of events

In February 2010,[5] the parties met to commence negotiations for a new agreement for six facilities in anticipation of the March 31 contract expiration date. There were five additional sessions, and the final session was held on July 15. The Employer's chief negotiator was its attorney, Michael Hnath, and the Union's chief negotiator was Vice-President Matthew Yarnell. Employee representatives from the six nursing facilities were present as part of the Union's negotiating committee for the first session, but they did not all attend all of the subsequent sessions.

The Employer's revenues are strongly impacted by Medicare and Medicaid reimbursement rates, which are annually established a few months into the calendar year, and the parties often defer economic proposals until those rates have been established. Consequently, on March 18, the Employer and the Union entered into a written agreement to extend the contracts month by month unless either party provided written notice of an intent to terminate an agreement no less than 10 days before the end of the month.

The Union and the Employer both assert that on July 15, at the conclusion of their sixth bargaining session, they reached agreement on the terms of new collective-bargaining

[5] All dates are 2010 unless otherwise indicated.

agreements for all six of the facilities involved in negotiations, with minor variations from contract to contract. The agreements were subject to ratification by the units.

On July 21, the Union presented to the bargaining unit for ratification a four-page document titled "SEIU Healthcare PA And Penn Med Tentative Agreement," which listed the changes to the expiring agreement. The unit ratified the contract by a vote of 11 to 1.

The contract's terms were put into effect on about August 15, with wages retroactive to July 1 and certain other provisions retroactive to April 1. The Union and the Employer have applied the contract since mid-August without difficulty. On September 7, about seven weeks after the ratification vote, the Petitioner filed the petition in this case.

The documents reflecting the parties' agreement

The Union and the Employer did not execute a single document containing all provisions of the contract. Rather, the parties' versions of the agreement were contained in separate sets of documents. The Union introduced its set of document into evidence at the hearing. The Employer did not offer its documents, and the Hearing Officer admitted them over the Union's objection.[6] The two sets of documents are not identical in appearance, as the parties added notations and changes to the proposals set forth on their respective documents as negotiations progressed.

According to Union Vice-President Yarnell, the parties memorialized their agreement at the July 15 session in a series of three documents that collectively set forth all changes to the prior agreement. He testified that the parties agreed that any language unchanged from the prior agreement was to be retained intact in the new agreement.

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[6] The Union contended that the exhibit lacked proper authentication, because Michael Hnath, the Employer's chief negotiator, was not present to testify about the compilation of these documents or the significance of handwritten notations in the margins. The Union further objected on grounds that any differences between the Employer's version and the Union's version were irrelevant. The Employer's Vice-President of Operations, David Long, testified that he sat next to Hnath and observed that Hnath made the notations on the document at the negotiating table, though Long could not state when certain undated notations were made or explain other notations.

I find that the admission of the annotated Employer copy of its proposal was proper. A hearing officer has substantial discretion to accept relevant documents into evidence and need not strictly follow the Federal Rules of Evidence in determining the admissibility of evidence. See, e.g., *International Business Systems*, 258 NLRB 181 fn. 6 (1981); enfd. 659 F.2d 1069, (3rd Cir. 1981). Under the circumstances, where there is no indication that the document was in any way unreliable, the decision to admit it into evidence was within the Hearing Officer's discretion, and the document is relevant to determining whether the parties reached full agreement and memorialized the agreement before the petition was filed.

The first of the three documents is a typewritten page, which initially served as the Employer's final proposal, titled "PennMed Counter Offer" and dated "7/15/2010." The words "Tentative Agreement, 7/15/2010" were added in handwriting, and the document was signed by four negotiators from the Union side and three from the Employer side.[7] This page sets forth eight agreed-upon items. Some of these items pertain to all six of the facilities, and others are specific to individual locations. Item Number 1 lists wage increase amounts for the bargaining unit(s) to be granted twice a year from July 1, 2010 through January 1, 2013. Number 2 states: "Wage scales as presented 5/25/2010; Adjust scales for over 1 year rates $00.05 on 7/1/2011 and 7/1/2012." Numbers 3 through 6 deal with personal days, funeral leave, and the "No Strike/No Lockout" provision. Number 7 reads: "This proposal is contingent upon the Union's agreement to the Employer's health insurance proposal dated 3/4/2010." The following unnumbered statement is typewritten at the end of the document: "Plus all tentative agreements to date as outlined on 6/24/2010."

The second document is a copy of a single handwritten notepad page, prepared by Yarnell, that briefly lists nine additional numbered items agreed to by the parties, including parties' name changes, health insurance and pension language, and provisions particular to different facilities. It was initialed by Yarnell and another unidentified individual and also bears the unexplained notation "ER" or "El." Both individuals who initialed it dated it "6/24/10."

Finally, there is an 11-page document titled "Proposal dated 3.4.2010." The cover page includes language indicating that the document includes the Employer's introductory proposal. The document then includes four pages of proposals on contract issues common to the six facilities. The negotiators for both sides each wrote marginal notes next to different proposals, and the Union crossed out several proposals. One marginal notation used by both parties at times is "T/A," which stands for "tentative agreement." The last six pages of the document include separate wage proposals for each of the six facilities. Yarnell testified that, in the process of recording the terms of the tentative agreement reached on July 15, he marked up a copy of the Employer's proposals to incorporate all changes, crossing out those items on which the parties did not reach agreement.

There are some differences between the parties' notations on their copies of the four pages of proposals that are common to the six facilities. One difference involves the term of the new agreement, which the Employer proposed at Item 2 as "April 1, 2010 through March 31, 2013." The Union's copy does not include any notes next to this item, and the Employer's copy has an undated marginal note reading "leaning toward that." The agreement presented to the unit for ratification included the dates from the Employer's proposal, the signed Tentative Agreement included raises covering this three year term, and Employer Vice-President of Operations David Long testified that he implemented relevant parts of the collective-bargaining agreement retroactively to April 1.

[7] The same seven signatures appear on both the Union's and the Employer's copies, but in different places on the respective documents. The Union negotiator testified that the parties signed or initialed multiple copies of the tentative agreement on July 15.

On the Union's copy of the proposal, Item 4, which deals with work hours, is crossed out in its entirety, while the handwritten word "no" appears next to this item on the Employer's document.

Item 5 is the Employer's health insurance proposal. The marginal note "T/A 4/21/2010 MY" appears at the beginning of that section on the Employer's copy. There is also an undated marginal note at the end of the section which reads: "MY 10% year No."[8] There are no notations on the Union's copy, nor is the item crossed out. Ultimately, the Employer's proposed language was included unchanged in both parties' documents. Moreover, as previously noted, the parties' July 15 "Tentative Agreement" indicates that the Employer's proposal was contingent on Union acceptance of its March 24 health insurance proposal, and this proposal was included in the document presented to the unit for ratification.

In Item 6, titled "26.1 Pension Benefits," the last sentence of the Employer's proposal states, "The Employer reserves the right to increase, reduce or eliminate the match at its sole discretion." That sentence is crossed out on the Union's document. On the Employer's copy, it is not crossed out. Rather, the Employer's notation next to this provision reads "OK except to last," and the word "No" is written next to the last sentence.

Item 7 deals with the "No Strike/Lock Out" provision." The proposal in the final paragraph of that provision would give the Employer the absolute right to discipline or discharge any employee that engages in certain specified conduct. The Union's copy has a marginal notation next to this provision stating "(No) subject to grievance procedure," while the Employer's version has the note, "add griev & arb."

Finally, Item 8, which deals with vacation pay, is crossed out on the Union's version. The Employer's version has the notation "No" on the left side, the words "one hundred twenty (120)"[9] crossed out twice, and "[illegible] to lowering threshold" written on the right side of the provision.

No witness identified any disagreements or reservations, either generally or specifically, concerning the Tentative Agreement, and no party contends that any provision of the contract was left unresolved as of July 15. The summary page of all changes to the expiring contract which the Union distributed to employees in connection with the ratification vote conforms to the Union's copy of the proposals, as well as the Tentative Agreement, and states that the agreement runs from April 1, 2010 through March 31, 2013.

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[8] "MY" presumably stands for Matthew Yarnell.

[9] One-hundred and twenty is a reference to the number of days that an employee can be laid off or absent due to illness without losing vacation pay.

IV. ANALYSIS

Based on a careful review of the testimony and documents in evidence at the hearing, I have concluded that the parties reached a clear agreement sufficient to establish a contract bar before the petition was filed. [10]

Yarnell testified without contradiction that any pre-existing contractual language not expressly revised in negotiations was retained unchanged. Thus, the bulk of the prior agreement was incorporated in the new agreement. The parties agree that all terms of the agreement were resolved and reduced to writing on July 15 and put into effect following ratification by the bargaining unit. The record includes each party's copy of three documents that purport to set forth the full agreement. Two of these three documents are identical, including the Tentative Agreement, which is signed by both parties and includes the bargaining unit's wage rates.

The discrepancies in the parties' copies of the third document consist of various marginal notations or cross-outs that do not reflect genuine differences between the Employer and the Union. There is no evidence that the Union ever proposed dates other than those set forth in the Employer's proposal. The wage increases listed on the July 15 "Tentative Agreement" cover the period through June 30, 2013, consistent with the Employer's proposal. These dates were then included in the ratification document, and the Employer implemented the contract consistent with the April 1 effective date of the contract. See *Television Station WVTV,* above; see also *Farrel Rochester Division of USM Corporation*, above. Thus, I find that there is no disagreement or uncertainty as to the term of the contract.

Another discrepancy is that the Union crossed out Items 4 and 8 and the last sentence of Item 6 on its copy, while the Employer wrote the word "no" next to these items. The difference as to the form in which the parties expressed a lack of agreement is insignificant.

The Employer's two marginal notations as to Item 5, Health Insurance, are seemingly contradictory because in one place, this item is marked with an undated "No," while elsewhere it is marked with the notation "T/A" which is dated and includes the Union negotiator's initials. However, the overall record is clear enough to warrant a finding that the latter notation clearly reflects an agreement between the parties on this issue. In this connection, the Union signed and dated the "T/A" on the Employer's copy, and it never crossed out this proposal on its own copy, unlike proposals with which it disagreed. Moreover, the cover page of the Tentative Agreement indicates that the agreement is contingent on the Union's acceptance of the Employer's initial health insurance proposal, so by signing it, the Union indicated acceptance. Additionally, the Union reproduced this proposal in full in the document distributed to employees for ratification. These facts demonstrate that there is no ambiguity or disagreement concerning the parameters of health insurance coverage under the new agreement.

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[10] The Petitioner does not address the contract bar issue but seeks to challenge the validity of the contract on grounds that the ratification vote was unfairly conducted and that low voter turnout rendered the results unrepresentative. These are not issues that are subject to review in the context of a representation petition.

Finally, as to Item 7, the No Strike/No Lockout provision, the parties' notations, while not identical, are entirely consistent, and this provision is included in the Tentative Agreement.

In sum, there is no conflicting evidence which casts doubt on the parties' intentions with respect to the terms and conditions of employment set forth in the agreement, nor as to the duration of the contract. See *Aramark Sports & Entertainment Services, Inc.,*. 327 NLRB 47 (1998). There were no outstanding matters left for further discussion, and no additional negotiating meetings were scheduled. *St. Mary's Hospital and Medical Center,* 317 NLRB 89, 90 (1995). The document setting forth the agreement for the ratification vote incorporates all matters resolved in negotiations, and there have been no disputes about the contract following implementation. *Television Station WVTV,* above, 250 NLRB at 199. I am satisfied based upon the entire record that the two sets of documents under review, though not identical in appearance, are consistent in substance. As the parties resolved all outstanding issues, reduced their agreement to writing and signed it, and set specific effective and expiration dates, I find that the contract bars an election. Id.; *Aramark Sports & Entertainment Services, Inc.*, above; *St. Mary's Hospital and Medical Center*, above.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union Involved is a labor organization that claims to represents certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

VI. ORDER

IT IS HEREBY ORDERED that the petition filed in this case be, and it hereby is, dismissed.

VII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed

with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Wednesday, October 27, 2010, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[11] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at **www.nlrb.gov.** Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

SIGNED: October 13, 2010

Dorothy L. Moore-Duncan

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106

[11] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.